

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

FRTZEN V. FRTZEN TRUCKING

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

TERRY FRTZEN, APPELLANT,
V.
FRTZEN TRUCKING, APPELLEE, AND TRAVELERS
INDEMNITY COMPANY, INTEVENOR-APPELLEE.

Filed March 27, 2012. No. A-11-534.

Appeal from the Workers' Compensation Court. Affirmed.

Travis Allan Spier, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Shirley K. Williams and James M. Ramey, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P. for appellee.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for intervenor-appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Terry Fritzen appeals from an order of affirmance on review issued by the three-judge review panel of the Nebraska Workers' Compensation Court issued on May 27, 2011. The review panel affirmed the order of dismissal entered by the Nebraska Workers' Compensation Court on December 16, 2010. For the reasons that follow, we affirm the decision of the review panel.

BACKGROUND

Fritzen is employed by Fritzen Trucking, a family company, as an over-the-road truckdriver. Prior to the alleged accident in this case, Fritzen experienced difficulties with his lower back, which required periodic medical treatment. He maintained full-time employment as a truckdriver in spite of this condition, being responsible for loading and unloading his truck.

In the instant case, Fritzen alleged he sustained an accident on April 21, 2003, when he was delivering hog machinery to a farmer in Iowa. The cause came before the Nebraska Workers' Compensation Court on December 8, 2009, and March 8, 2010.

Fritzen described a very specific accident and testified he had an immediate onset of significant pain and knew he had suffered a new injury. Fritzen testified that he and the farmer picked up a loaded pallet from his truck, rather than using a forklift or "Bobcat," because the farmer said he did not have time to get the forklift out. Fritzen said the farmer dropped his side of the pallet, causing Fritzen to be pulled forward into a bent position while still holding his half of the loaded pallet. Fritzen testified he experienced a popping sensation and pain shooting down his lower back and buttocks. Fritzen stated that after the accident, he stayed in a motel because he was in so much pain and all he wanted to do was get home as soon as possible.

Fritzen said he reported the accident immediately to his employer, his father, doing business as Fritzen Trucking. The accident was not reported to anyone else at the time. Fritzen's first medical treatment was 3 days later. On May 22, 2003, an insurance agent for Penner Insurance, Fritzen Trucking's insurance carrier, called to ask about a medical bill for Fritzen's treatment. At that time, Fritzen reported the alleged incident and filled out the first report of injury form. Fritzen told the insurance agent that the accident occurred in Ida Grove, Iowa. At Fritzen's deposition, he testified that he did not know where the accident occurred or recall the name of the farmer he delivered to. However, he said the driving logs he is required to maintain would document the occurrence of the accident and the name of the witness. Driver logs showed no reference to an accident, a location, or a specific person who helped to unload a pallet near Ida Grove. The logs showed that on April 21, the alleged day of the accident, Fritzen drove from Nebraska to Doon, Iowa; then to Crooks, South Dakota; then to Sioux Falls, South Dakota; and then to Sioux City, Iowa. The logs also indicate that Fritzen spent the night in the sleeper berth of the truck trailer and not in a hotel or motel. On April 22, the logs indicate Fritzen drove from Sioux City to Beatrice, Nebraska, making stops along the way, and on April 23, he drove another 12 hours.

The court heard testimony regarding Fritzen's medical history. Fritzen has been treated for low-back pain for many years, and the evidence shows at least two doctors recommended surgery. Prior to the alleged accident, Fritzen visited the Gage County Medical Clinic on March 7, 2003, for pain medication, and his records indicate he told doctors he was considering surgery once his work schedule slowed down.

On April 24, 2003, Fritzen saw his primary care physician, who noted Fritzen's chronic low-back pain and history of spondylolithesis, prescribed pain medications, and referred Fritzen to Dr. Daniel Ripa, an orthopedic specialist. Fritzen saw Dr. Ripa and reported that on April 21, he was lifting a pallet with an associate and the associate dropped his side, causing Fritzen to be pulled to a bent position. Dr. Ripa initially treated with prescription medication and rest, but the

problem did not resolve completely. Fritzen underwent an MRI showing annular bulging, and Dr. Ripa recommended anterior and posterior fusion. Fritzen chose to postpone the fusion, and after his condition did not improve, he had the procedure on November 12, 2003. Fritzen reported the fusion did not resolve his symptoms.

A neurosurgeon reported that the claimed accident neither caused nor aggravated Fritzen's longstanding low-back condition. The court-appointed physician reviewed Fritzen's medical records and found that his low-back condition was not caused by his claimed accident and that at most, it was only a temporary flareup of a preexisting condition.

The Workers' Compensation Court's order of dismissal was issued December 16, 2010. The court cited numerous inconsistencies in the evidence and ultimately determined Fritzen's case was not persuasive or credible to show he sustained a work accident arising out of and in the course of his employment with Fritzen Trucking on April 21, 2003. The review panel upheld that decision in the order of affirmance on review, issued May 25, 2011.

ASSIGNMENTS OF ERROR

Fritzen's assignments of error, consolidated and restated, are that the review panel erred in affirming the trial judge's finding that no work accident occurred, affirming the trial judge's findings on the medical issues, and failing to find the trial judge committed an abuse of discretion in dismissing Fritzen's petition.

STANDARD OF REVIEW

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing. The findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Swanson v. Park Place Automotive*, 267 Neb. 13, 672 N.W.2d 405 (2003).

ANALYSIS

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Weichel v. Store Kraft Mfg. Co.*, 10 Neb. App. 276, 634 N.W.2d 276 (2001). If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *Id.*

When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility. *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006).

The Nebraska Supreme Court has ruled that the issue of whether an employee suffered an accident at work is a factual question to be decided by the compensation court at trial. See *Hernandez v. Hawkins Constr. Co.*, 240 Neb. 129, 480 N.W.2d 424 (1992).

Fritzen alleges the review panel erred in affirming the trial judge's order of dismissal. The trial judge found Fritzen failed to present sufficient proof that on or about April 21, 2003, he sustained a work accident. The trial judge cited inconsistencies in the evidence to support this finding, and the review panel stated it was unable to say the trial judge was clearly wrong in failing to find the evidence persuasive.

Fritzen was the sole witness to the alleged accident, and the court found his testimony to be unreliable. There was no evidence to corroborate Fritzen's testimony regarding how the accident was alleged to have occurred, where it happened, when it happened, and the actions he took after it occurred. Fritzen claimed to have suffered a specific accident occurring on April 21, 2003, when lifting a pallet with a farmer in Iowa. He said he knew instantly that he had suffered a significant injury, yet he waited several days to seek medical attention and did not report his injuries to his insurer. The driving logs he personally created as part of his employment do not match the events he described to his insurance agent and doctors after the fact. Under the circumstances, we agree that the court was not clearly wrong to find that Fritzen failed to prove he sustained a work accident.

Fritzen also argues the court relied upon irrelevant evidence and overlooked the evidence he presented regarding his medical condition. The evidence shows Fritzen has suffered from low-back pain for many years and was prescribed medication for pain about 1 month before the alleged accident. He testified that this case was only about one incident--the one that occurred while unloading hog machinery in Iowa. However, the information he provided regarding this incident is inconsistent. The information provided to his doctors, and included in his medical records, does not match the driving records he prepared for his employer. Other medical professionals reviewed Fritzen's case and determined the alleged accident was not the cause of his symptoms. The trial judge found Fritzen's testimony was not credible because he provided varying information related to the alleged accident. It is not clear error for the court to find, based on the evidence, that Fritzen's back problems were a result of preexisting and longstanding problems. The court stated the symptoms "simply became worse and this worsening was not attributable to any of his work duties."

The trial judge found that Fritzen had not provided persuasive evidence to support his claim, and the review panel determined that this finding was not clearly wrong. We agree with the decisions of the trial judge and the review panel.

CONCLUSION

We find the decision of the trial judge to dismiss Fritzen's amended petition was not clearly wrong; therefore, the review panel did not err in affirming the trial judge's order. The decision of the review panel is affirmed.

AFFIRMED.